Nos. 00-70014; 00-70734; 00-70822

Before: James R. Browning, Stephen Reinhardt, and Richard C. Tallman, Circuit Judges. Opinion by Justice James R. Browning, decided January 14, 2003

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL DEFENSE CENTER, INC. *ET. AL.,*
Petitioners,

V.

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Action by the
Environmental Protection Agency

JOINT PETITION FOR PANEL REHEARING AND REHEARING EN BANC BY THE TEXAS CITIES COALITION ON STORMWATER AND THE TEXAS COUNTIES STORM WATER COALITION

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TABLE OF CONTENTS

PAGE

Table of Authorities . . . . . **ii**

I. Introduction **1**

II. Background **3**

III. This Matter is Appropriate for Rehearing En Banc **5**

A. The Court's ruling that EPA's interpretation of the Clean Water Act to allow it to commandeer local government police powers does not raise "grave and doubtful" constitutional issues conflicts with Ninth Circuit and Supreme Court precedent, and is an issue of exceptional importance **5**

B. The Court's ruling that EPA's rule does not unconstitutionally commandeer local government police powers because of the presence of unreasonable alternatives conflicts with Ninth Circuit and Supreme Court precedent, and is an issue of exceptional importance importance **11**

IV. This Matter is Appropriate for Panel Rehearing **16**

Conclusion **17**

TABLE OF AUTHORITIES

Page

CASES

Board of Natural Resources of the State of Washington v. Brown, 992 F.2d 937 (9th Cir. 1993) 3, 11, 12

Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977), *aff'd*, 566 F.2d 665 (9th Cir. 1977) 2, 6, 8, 9, 16

Brown v. EPA, 566 F.2d 665 (9th Cir. 1977) 6,7, 8, 9, 16

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) 6, 7, 8, 9, 10

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 10

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) 10

Hughey v. JMS Development Corp, 78 F.2d 1523, 1530 (11th Cir. 1996) 13

Mississippi Revival, Inc. v. City of Minneapolis, No. 01-2511, slip op. at 7 (8th Cir. Feb. 7, 2003) 12

New York v. United States, 505 U.S. 144 (1992) 3, 12

Solid Waste Agency of Northern Cook Cty v. Army Corps of Engineers, 121 S.Ct. 675, 683 (2001) 2, 8, 9

Washington v. Brown, 992 F.2d 937 (9th Cir. 1993) 3

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) 2, 7, 8

STATUTES

Clean Water Act
33 U.S.C. §1342(p)(6) ["§402(p)(6)"] 4

40 C.F.R.
§122.26(b)(8) 4, 15
§122.26(b)(16) 4
§122.34(b)(3)(B) 4
§122.126(d)(2)(iv)(B) 15
parts 9, 122, 123, 124 4

PETITION FOR REHEARING/REHEARING EN BANC

I. Introduction

In a ruling of constitutional significance, and in conflict with both prior rulings of this Court and the laws of nature, a split panel of this Court held that the sovereign powers of states and local governments may be commandeered by a federal administrative agency, without any clear directive from Congress, as a precondition to allowing storm water runoff to flow out of municipal separate storm sewers. The decision contradicts Supreme Court and Ninth Circuit precedent on the weight to be given agency interpretation of a statute when the agency interpretation raises a serious constitutional issue affecting the balance of power of between the state and federal governments, and also conflicts with Supreme Court and Ninth Circuit precedent on the limits of federal power to commandeer the legislative and executive powers of local governments to carry out a federal program.

The Texas Cities Coalition on Stormwater and the Texas Counties Stormwater Coalition ("Texas Petitioners") request rehearing of this ruling en banc for the following reasons:

1. The panel majority opinion conflicts with decision of both the Supreme Court and the Ninth Circuit and en banc consideration is necessary to maintain the uniformity of the courts' decisions.

(a) The majority opinion's holding that the United States Environmental Protection Agency's ("EPA's") interpretation of the Clean Water Act to allow it to commandeer local government police powers does not raise "grave and doubtful" constitutional issues conflicts with *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977), *aff'd*, 566 F.2d 665 (9th Cir. 1977) (vacated as moot after EPA withdrew the rule) (refusing to accord deference to EPA's interpretation of the Clean Air Act that would allow EPA to commandeer state police powers without a clear congressional statement); *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997) (court not bound to defer to agency interpretation where that interpretation raises difficult constitutional questions); and *Solid Waste Agency of Northern Cook Cty v. Army Corps of Engineers*, 121 S.Ct. 675, 683 (2001) [hereinafter *S.W.A.N.C.C.*] (court will not defer to an administrative interpretation that alters traditional federal-state framework without a clear indication that Congress intended the result).

(b) The majority opinion's holding that EPA's rule does not unconstitutionally commandeer local government police powers because of the presence of alternatives conflicts with *New York v. United States*,

505 U.S. 144 (1992); and *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993), as noted in the dissenting opinion in this case, because the alternatives themselves are unreasonable and legally infirm.

2. The panel majority opinion involves several questions of exceptional importance that substantially affect a Clean Water Act rule of national application for which there is a need for national uniformity:

   (a) Whether a court should defer to an administrative agency's interpretation of a statute when the interpretation raises significant constitutional issues affecting the division of authority between federal and state governments, when there is no clear statement that Congress intended to intrude on the sovereignty of the states or local governments.

   (b) Whether a federal administrative agency, or Congress, may validly commandeer local police powers by providing alternatives that are themselves constitutionally infirm.

This case is also appropriate for rehearing by the panel for the reasons set forth in 1(a) and (b) above.

II. Background

In 1999 EPA promulgated the Storm Water Phase II Rule under the Clean

Water Act. *See* 33 U.S.C. § 1342(p)(6) ["§ 402(p)(6)"]; 40 C.F.R. pts. 9, 122, 123, 124. The Rule, among other things, set out a permitting scheme to authorize discharges from small municipal separate storm sewer systems ("MS4s")[1] to waters of the United States. In the Rule, EPA specified the permit requirements including six minimum control measures to be implemented by owners[2] of small MS4s (which for simplicity are referred to as "local governments"). Many of the minimum measures specified by EPA expressly require local governments to adopt ordinances and other regulatory measures. *E.g.*, 40 C.F.R. § 122.34(b)(3)(B). Additionally, in response to comments concerning the constitutionality of EPA's minimum measures approach, EPA added a provision to the Rule that would allow a local government to implement a "different" kind of program by submitting an application meeting EPA's Storm Water Phase I application requirements.

The Texas Petitioners filed a petition for judicial rule challenging EPA's

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[1]The majority of the panel seems to view the MS4 as a discrete system that can be easily removed from service by either plugging the intake structures or the outfalls. However, this view does not conform to EPA's definition of MS4 to include all publicly-owned property designed or merely used, intentionally or incidentally, for collecting or conveying storm water, including roads, streets, sidewalks, ditches and drains. 40 C.F.R. § 122.26(b)(8). Thus, a significant portion of public property is, by EPA's definition, part of an MS4.

[2]By definition, the owners of MS4s are public entities: "United States, a State, city, town, borough, county, parish, district, association, or other public body." 40 C.F.R. § 122.26(b)(16).

statutory and constitutional authority to compel local governments to regulate third parties according to EPA's plan. A split panel of this Court denied the Texas Petitioners' petition. The majority held that EPA's Rule did not impermissibly commandeer local regulatory powers because local governments had two alternatives to the commandeering: the option of not discharging stormwater and the alternative individual [Phase I] permit option. The dissent argued that the petition should have been granted because the two alternatives were not reasonable since stormwater runoff cannot reasonably (or physically) be kept from flowing into waters of the United States, and because the individual [Phase I] permit alternative also contains impermissible commandeering provisions.

III. This Matter is Appropriate for Rehearing En Banc

A. The Court's ruling that EPA's interpretation of the Clean Water Act to allow it to commandeer local government police powers does not raise "grave and doubtful" constitutional issues conflicts with Ninth Circuit and Supreme Court precedent, and is an issue of exceptional importance.

The underlying issue is whether EPA has the power, either statutorily or constitutionally, to compel local governments to adopt ordinances to regulate the conduct of others. The Texas Petitioners argued that EPA lacks the statutory authority to compel local governments to regulate others either directly or conditionally because both approaches raise significant and fundamental federalism

issues and there is no clear statement from Congress that it intended this result. The majority opinion, rather than addressing the statutory issue, jumped immediately to the constitutional question, implicitly holding that EPA's interpretation of the Clean Water Act to allow it to commandeer local government police powers does not raise "grave and doubtful" or "significant" constitutional issues, and then gave *Chevron*[3] deference to EPA's interpretation of its powers.

The majority's implicit holding directly conflicts with this Court's prior decisions in *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975) [*Brown I*], and *Brown v. EPA*, 566 F.2d 665 (9th Circuit 1977) [*Brown II*], and the Supreme Court's decision in *S.W.A.N.C.C.* In *Brown I* and *Brown II*, this Court held that EPA could not order the State of California to implement, among other things, a vehicle emission inspection and maintenance program**,** because allowing EPA to construe the statute to provide such power would raise fundamental constitutional concerns and the Clean Air Act did not unambiguously vest EPA with that power. *Brown I*, 521 F.2d at 834; *Brown II,* 566 F.2d at 679**.**

After losing in *Brown I,* where EPA took the position that it could directly compel a state to regulate, EPA changed the characterization of its approach in *Brown*

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[3]*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

II and argued that it could direct California to implement a vehicle inspection and maintenance program because California "owns roads and highways and is therefore itself a polluter." *Brown II*, 566 F.2d at 669. This Court noted that even EPA's restrained constitutional position continued "to raise serious questions which justify our prudent reading of the Clean Air Act." *Brown II*, 566 F.2d at 671.

In *Williams*, this Court held that the an administrative interpretation of the Reindeer Act to prohibit non-Native entry into the reindeer industry in Alaska would not be given *Chevron* deference because the interpretation raised difficult constitutional questions. *Williams*, 115 F.3d at 663. In that case, this Court acknowledged that the agency interpretation would have been upheld under a strict application of *Chevron* deference. Nevertheless, the Court refused to afford such deference because the agency's interpretation raised serious constitutional equal protection issues. This Court did not resolve the constitutional question; it merely identified the question as the first step in its construction of the statute. As this Court noted: "When agencies adopt a constitutionally troubling interpretation, however, we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably didn't consider them at all." *Williams*, 115 F.3d at 662.

In *S.W.A.N.C.C.*, the Supreme Court held that the Corps of Engineer's "Migratory Bird Rule," which extended the definition of waters of the United States

to include intrastate waters used by migratory birds, exceeded the authority granted to the Corps under the Clean Water Act. The Court concluded that the rule exceeded the Corps' authority because it raised a significant constitutional question by altering the federal-state balance without a clear statement that Congress intended to do so and thus no *Chevron* deference would be given. *S.W.A.N.C.C.*, 531 U.S. at 173-74.

The majority opinion in this case fails to explain why EPA's position does not raise the same type of serious constitutional questions present in *Brown I & II, Williams,* and *S.W.A.N.C.C.* In fact, the panel majority wholly fails to cite or discuss either *Brown I or II.*[4] Instead, the majority first analyzes the constitutionality of EPA's rule and then, having concluded that the Rule is constitutional (but only after going to a lot of effort to make it constitutional[5]), applies a *Chevron* deference analysis to conclude that EPA had the authority to use its "minimum measures" approach.

The majority's analysis is backwards, and incorrect. Instead of first asking

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[4]The majority's failure to distinguish *Brown II* is also significant because, just as in this case, EPA argued in *Brown II* that its approach of directing the states to act was based on the states' role as the owner and operator of a conveyance system and not in its sovereign capacity.

[5]In *Brown II*, this Court succinctly explained application of the analysis: "[T]he judiciary should be reluctant to declare the federal government the winner in these contests between state and federal authorities in which the record reflects, at best, a draw." *Brown II,* 566 F.2d at 673.

whether EPA's "minimum measures" approach raises a serious constitutional question and then construing the statute to avoid the constitutional question – without *Chevron* deference – the majority opinion addresses the constitutional question head-on as if EPA's approach was clearly authorized by Congress. The analysis thus conflicts directly with *Williams* and *S.W.A.N.C.C.* Once the panel identified the presence of the non-trivial constitutional issue (which is present even with EPA's alternative individual permit option), the panel should have construed the statute to avoid the constitutional issue. In doing so, the panel should not have given *Chevron* deference, but should have concluded that the Clean Water Act does not authorize EPA to impose permit conditions that commandeer local government police powers.

The panel majority's ruling also involves a question of exceptional importance: Should a court defer to an administrative agency's interpretation of an ambiguous statute where that interpretation raises significant constitutional issues affecting the division of authority between federal and state governments, absent a clear statement that Congress intended to authorize the agency to intrude upon state sovereignty?

The answer to the this question, controlled by the Supreme Court's decision in *S.W.A.N.C.C.*, is that a court should not defer to the administrative agency's interpretation when that interpretation alters the federal-state balance, unless there is a clear statement that Congress intended the result. 531 U.S. at 173-74.

The majority opinion erred in concluding that EPA's commandeering of local governments' police powers does not raise significant constitutional questions. The constitutional issue raised by EPA's interpretation in this case is the same as the constitutional issue raised by EPA's interpretation in *Brown I & II* and in *S.W.A.N.C.C.* The issue is extraordinarily significant because it addresses a fundamental aspect of our federalist political structure.

The Supreme Court's recent holdings indicate that this "clear statement rule" is especially important with regard to federalism issues. In these situations, the clear statement rule is not just prudential but is constitutionally required. By allowing EPA to alter the federal-state balance without express direction from Congress, the majority opinion eviscerates the notion that the power of the states will be protected by the political process that was the lynchpin of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. '[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect the states' interests.'" *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

Supreme Court and Ninth Circuit precedent require that no *Chevron* deference be given to an agency construction of a statute when that construction raises significant constitutional questions and there is no clear statement that Congress intended such a result. By deferring to EPA's construction of the Clean Water Act that raises significant federalism concerns, the panel majority's opinion conflicts with Supreme Court and Ninth Circuit authority, and a rehearing en banc is necessary to maintain the uniformity of the courts' decisions. Additionally, rehearing en banc is warranted because the opinion substantially affects a rule of national application for which there is an overriding need for national uniformity.

B. The Court's ruling that EPA's rule does not unconstitutionally commandeer local government police powers because of the presence of unreasonable alternatives conflicts with Ninth Circuit and Supreme Court precedent, and is an issue of exceptional importance.

The majority opinion rests on the conclusion that EPA's action was constitutional because EPA provided two alternatives to the commandeering provisions of the Rule, which eliminate the serious constitutional question that otherwise would be raised by EPA's approach: the option of not discharging at all, and the alternative [Phase I] permit option. This conclusion is flawed because the alternatives relied upon by the majority opinion are themselves not reasonable – as the dissent recognized – and so cannot validate an otherwise unconstitutional action

by EPA. The panel majority's conclusion also is in conflict with Ninth Circuit and Supreme Court precedent.

As noted by the dissent in this case, the majority opinion's decision conflicts with this Court's prior decision in *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993). That case examined the constitutionality of the Forest Resources Conservation and Shortage Relief Act and several orders of the Secretary of Commerce implementing that act. The Secretary of Commerce argued that the act, which mandated that certain states enact regulations implementing an export ban on timber harvested from state public lands, did not violate the Tenth Amendment because the states had the choice of "simply halting all sales of timber." *Board of Natural Resources*, 992 F.2d at 947. This Court recognized that this "choice" was, in reality, no choice at all because it ignored the state's fiduciary duty to manage its timber property, and held that the act and the administrative orders implementing it violated the Tenth Amendment, as interpreted by the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992), as direct commands to the states to implement a federal regulatory program. *Board of Natural Resources*, 992 F.2d at 947.

The dissent in this case also noted that EPA's Rule gives local governments even less of a "choice" than the states were given in *Board of Natural Resources*

because the alternatives relied upon by the panel majority cannot realistically be accomplished. Slip Op. at 661-62, 665 (Tallman, J., dissenting). Municipal separate storm sewer systems are open systems composed primarily of streets, roads, ditches, and drains. Like the timber trust property in *Board of Natural Resources*, local governments manage these systems to meet a wide range of services and priorities, from transportation to drainage. These systems were not designed and are not operated as pollution transportation devices.

The majority opinion posits that local governments are not compelled to regulate third persons pursuant to EPA's Rule because local governments have the option of not discharging storm water runoff into waters of the United States. Slip Op. at 594-98. This conclusion defies reason and the law of gravity, and has no support in the administrative record. As succinctly explained in the dissent, the law of gravity is inflexible - storm water runoff will always flow downhill through the municipalities to reach waters of the United States.[6] Slip Op. at 665 (dissent). The

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[6]This elementary fact of physics has been recognized by other circuit courts. *Mississippi Revival, Inc. v. City of Minneapolis*, No. 01-2511, slip op. at 7 (8th Cir. Feb. 7, 2003) ("The Cities cannot stop snow and rain from falling and cannot stop storm waters from carrying "pollutants" such as sediment and fertilizer from running downhill and flowing into the Mississippi River."); *Hughey v. JMS Development Corp.,* 78 F.3d 1523, 1530 (11th Cir. 1996) ("Practically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that.").

majority opines that local governments may stop discharging storm water runoff by using such things as recycling programs and wetland construction. Slip Op. at 596. There is nothing in the administrative record, however, that supports the proposition that local governments could use these alternative methods (or any others) to prevent discharges of storm water to waters of the United States. The absence of record support for such a proposition is not surprising, given the impossibility of such a gravity-defying undertaking, and because EPA has never asserted that all discharges from an MS4 can be stopped.

The second alternative relied upon by the panel majority to save the primary approach of the Rule is the presence of EPA's alternative individual [Phase I] permit option. The majority concludes that this option negates any conclusion that EPA's Rule compels local governments to regulate third persons, because under such an alternative permit no local government will have to regulate any third persons. Such reasoning, were it accurately predicated, might support the majority opinion. Unfortunately – as recognized by the dissent – EPA's alternative individual permit option suffers from the same constitutional defects as its general permit approach: It does compel local governments to regulate third persons. *See* Slip Op. at 666-67 (dissent).

Contrary to the panel majority's characterization, EPA's alternative individual

permit would require that a municipality prohibit discharges to the storm sewer system. 40 C.F.R. § 122.126(d)(2)(iv)(B). As defined by EPA, however, municipal separate storm sewer systems are open systems. 40 C.F.R. § 122.26(b)(8). To prevent discharges to an MS4, a local government would not only have to block storm drains physically, but would also have to deny all other physical access to the MS4. That would require, among other things, prohibiting all vehicular and pedestrian traffic on streets[7] and also precluding runoff from all privately-owned or operated tracts of land adjacent to publicly-owned streets, roads, ditches and other property. Thus, any alternative individual permit drafted in compliance with this "alternative" necessarily would require local governments to regulate third parties.

The panel majority's ruling thus also involves a question of exceptional importance: Can a federal administrative agency, or Congress, validly commandeer local police powers by providing an unreasonable alternative?

The answer must be that an "alternative" capable of saving an otherwise unconstitutional federal action must be a reasonable alternative. The courts must have some role in determining the boundaries of federal power**.** If the federal

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[7]Streets and roads are by definition part of an MS4. 40 C.F.R. §122.26(b)(8). Cars discharge numerous materials to streets, including oil, brake lining, antifreeze, and air-borne solids. Pedestrians, likewise, discharge materials into streets, including such things as cigarette butts, food packaging, and plastic or paper containers, and their contents.

government can extend its power merely by offering unreasonable (or impossible) alternatives, then there is no limit to federal power. If the panel majority's opinion is correct, then the federal government will be able to directly conscript the states rather than coercing them under the Spending Power. Why spend federal funds as an inducement for states to implement the Clean Water Act or the Clean Air Act, when all the federal government needs to do is offer the states a "choice" to regulate or stop allowing others to use their waterways, roadways or airsheds?

Supreme Court and Ninth Circuit precedent mandate that a federal agency may not commandeer the regulatory powers of local governments. The panel majority opinion, by concluding that a federal agency may commandeer such powers so long as the agency offers even an unreasonable alternative, conflicts with Supreme Court and Ninth Circuit authority, and a rehearing en banc is necessary to maintain the uniformity of the Court's decisions. Additionally, rehearing en banc is warranted because the opinion substantially affects a rule of national application for which there is an overriding need for national uniformity.

IV. This Matter Is Appropriate for Panel Rehearing

The Texas Petitioners request that the issues set out in Section III above be reheard by the panel. The Texas Petitioners believe that the panel failed to appropriately apply the Supreme Court's holding in *S.W.A.N.C.C.* and this Court's

decisions in *Brown I and II* to the issues in this case. Additionally, the Texas Petitioners believe that the panel majority opinion rests on factual assumptions (*e.g.*, the practical ability to stop runoff from reaching waters of the United States and acceptability of the alternative individual permit) that are not supported by the record in this proceeding.

CONCLUSION

For the foregoing reasons, the Texas Petitioners respectfully request rehearing by the panel of the issues identified above, and/or rehearing en banc, as appropriate.

Respectfully submitted,

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